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Supreme Court of the United States

OCTOBER TERM, 1971

No. 68-5027

ERNEST JAMES AIKENS, JR.

v.

CALIFORNIA

BRIEF OF AMICI CURIAE

SUBMITTED BY

NATIONAL COUNCIL OF THE CHURCHES OF CHRIST IN THE UNITED STATES OF AMERICA
AMERICAN FRIENDS SERVICE COMMITTEE
BOARD OF SOCIAL MINISTRY, LUTHERAN CHURCH IN AMERICA
CHURCH OF THE BRETHREN, GENERAL BOARD
COUNCIL FOR CHRISTIAN SOCIAL ACTION OF THE UNITED CHURCH OF CHRIST
DEPARTMENT OF CHURCH IN SOCIETY OF THE CHRISTIAN CHURCH (DISCIPLES OF CHRIST)
THE RT. REV. JOHN E. HINES, PRESIDING BISHOP OF THE EPISCOPAL CHURCH IN THE UNITED STATES
GENERAL BOARD OF CHRISTIAN SOCIAL CONCERNS OF THE UNITED METHODIST CHURCH
GREEK ORTHODOX ARCHDIOCESE OF NORTH AND SOUTH AMERICA
THE AMERICAN ETHICAL UNION
THE UNITED PRESBYTERIAN CHURCH IN THE UNITED STATES OF AMERICA BY MRS. RALPH M. STAIR, MODERATOR AND WILLIAM P. THOMPSON, STATED CLERK OF THE GENERAL ASSEMBLY
NATIONAL CATHOLIC CONFERENCE FOR INTERRACIAL JUSTICE
NATIONAL COALITION OF AMERICAN NUNS

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NATIONAL COALITION OF AMERICAN NUNS

INTRODUCTION

The above religious organizations, by their attorneys, Willard J. Lassers and Elmer Gertz, file this brief amici curiae in support of petitioner. Petitioner and respondent have consented to the filing of this brief.

The religious organizations represent as follows:

The legal arguments on behalf of petitioner will be presented by his counsel. There are, however, a number of ethical considerations of deep concern to the religious organizations. Most of these organizations formally have taken stands in opposition to capital punishment. In the appendix to this brief we include the formal statements of amicus National Council of the Churches of Christ in the United States of America, other amici religious organizations and other denominations. We note additionally that the World Council of Churches at its International Conference at Addis Ababa on January 10-21, 1971, declared,

"Recent events in many countries have compelled us to think especially about capital punishment.

"We are convinced that one significant expression, at this time of history, of the belief of the Christian Church in the sanctity and dignity of human life would be the promotion of common and concerted efforts towards the abolition of capital punishment."

Amici desire to present views somewhat different from that of petitioner and other amici. These views they think will contribute to a more complete understanding of the case.

This brief while formally submitted in *Aikens* v. *California,* No. 68-5027, is relevant also to the three companion cases, *Furman* v. *Georgia,* No. 69-5003, *Jackson* v. *Georgia,* No. 69-5030, and *Branch* v. *Texas,* No. 69-5031. We shall refer to these cases in this brief.

The National Council of the Churches of Christ in the United States of America is a federation of 33 national

denominations with an aggregate membership of about 42,000,000. Among them are several Eastern Orthodox bodies and several predominantly black denominations. The amici other religious organizations have a total membership exceeding 26,400,000 (a portion of which is included among the 42,000,000 just mentioned).

The amici are:

1. NATIONAL COUNCIL OF THE CHURCHES OF CHRIST IN THE UNITED STATES OF AMERICA

The National Council of the Churches of Christ in the United States of America is a federation of thirty-three national denominations with an aggregate membership of approximately 42,000,000. Among them are several Eastern Orthodox bodies and several predominantly black denominations. The National Council of Churches is governed by a General Board of 250 members made up exclusively of representatives of the member denominations proportionate to their size and support and chosen according to their own respective procedures. In September, 1968, the General Board adopted a policy statement urging the abolition of the death penalty, by a vote of 103 for, 7 against, and 0 abstaining.

2. AMERICAN FRIENDS SERVICE COMMITTEE

The American Friends Service Committee has, since 1917, engaged in religious, charitable, social, philanthropic and relief work on behalf of the several branches and divisions of the Religious Society of Friends in America. There are approximately 123,000 Friends in the United States. The American Friends Service Committee, although it cannot speak for all Friends, has a vital interest in this litigation because of Friends' historic and continued opposition to the taking of human life by the State. Such

opposition to capital punishment goes back more than 300 years, to the beginning of the Quaker movement and stems from Quaker belief that there is an element of the divine in every man.

3. BOARD OF SOCIAL MINISTRY, LUTHERAN CHURCH IN AMERICA

The Board of Social Ministry is an instrumentality of the Lutheran Church in America. Its object is "to inquire into the nature and proper obedience of the church's ministry within the structures of social life . . . devoting itself in particular to those aspects of the church's ministry in which individual and social needs are met as an expression of Christian responsibility for love and justice."

The 1966 biennial convention of the Lutheran Church in America adopted a social statement on capital punishment urging abolition of capital punishment. The Lutheran Church in America has 3,300,000 members in 6,225 congregations in the United States and Canada.

4. CHURCH OF THE BRETHREN GENERAL BOARD

The Church of the Brethren General Board is the administrative arm of the Church of the Brethren. It carries out policies adopted by the church's legislative arm—Annual Conference—in the areas of world ministries, parish ministries and general services. Among its world ministries are efforts to correct social injustices at home and abroad. The Church of the Brethren has adopted policy statements opposing capital punishment on several occasions, the last one being in 1959 at the Annual Conference. The Church of the Brethren has 200,000 members in approximately 1,000 churches.

5. COUNCIL FOR CHRISTIAN SOCIAL ACTION OF THE UNITED CHURCH OF CHRIST

The Council for Christian Social Action is an instrumentality of the United Church of Christ devoted to promoting education and action in international, political and economic affairs. The Council stated its position in opposition to capital punishment in a policy statement of January 30, 1962. The United Church of Christ has over 2,000,000 adherents.

6. DEPARTMENT OF CHURCH IN SOCIETY OF THE CHRISTIAN CHURCH (DISCIPLES OF CHRIST)

The Department of Church in Society of the Division of Homeland Ministries is a part of The United Christian Missionary Society, a national unit of the Christian Church (Disciples of Christ). The Christian Church has approved two resolutions on capital punishment in its International Convention. The first resolution, approved in October 1957 at Cleveland, Ohio, stressed the need for rehabilitation of criminals and indicated that "the practice of capital punishment stands in the way of more creative, redemptive and responsible treatment of crime and criminals. The second, "Concerning Abolition of Capital Punishment," was approved in the October 1962 Assembly of the International Convention at Los Angeles, California. This resolution specifically placed the Christian Church (Disciples of Christ) on record as "favoring a program of rehabilitation for criminal offenders rather than capital punishment."

The Christian Church (Disciples of Christ) in the United States and Canada has a membership of 1,600,648.

7. THE RT. REV. JOHN E. HINES, PRESIDING BISHOP OF THE EPISCOPAL CHURCH IN THE UNITED STATES

The Presiding Bishop is the president of The Domestic and Foreign Missionary Society of The Protestant Episcopal Church in the United States of America which has 7,464 parishes and missions, 11,772 ordained clergy and 3,475,164 baptized members. The Episcopal Church at its 1958 General Convention adopted a resolution in opposition to the death penalty.

8. GENERAL BOARD OF CHRISTIAN SOCIAL CONCERNS OF THE UNITED METHODIST CHURCH

The General Board of Christian Social Concerns is an instrumentality of the United Methodist Church. Its purpose is to further the works of the church in the sphere of social affairs. The United Methodist Church at its 1960 General Conference adopted a statement opposing the death penalty. The statement was revised in 1964 and is now part of United Methodist Social Policy. The United Methodists number 11,000,000 members among their 38,000 churches which are situated in every state.

9. GREEK ORTHODOX ARCHDIOCESE OF NORTH AND SOUTH AMERICA

The Greek Orthodox Church expresses the belief that every person should be afforded every opportunity to establish his innocence. If he is found guilty, he should be afforded every opportunity to present what evidence he can to mitigate his guilt. The Greek Orthodox Church consists of 500 parishes, largely in the United States and Canada, and some in Central and South America. The membership of the Church is 1,500,000.

10. THE AMERICAN ETHICAL UNION

The American Ethical Union is a federation of the Ethi-
l Culture Societies and Fellowships in the United States,
ich, collectively constitute a liberal religious humanist
llowship known as the "Ethical Movement" or the "Ethi-
l Culture Movement."

The first Ethical Culture Society was founded in New
rk City in 1876 by Dr. Felix Adler. There are today 24
cieties and Fellowships of the American Ethical Union
ten states and the District of Columbia. The American
hical Union is a member of the International Humanist
d Ethical Union, a world-wide organization, with head-
arters in Utrecht, The Netherlands. Religious humanists
pose the death penalty. The American Ethical Union
s adopted policy statements calling for its abolition, and
embers and Leaders (Ministers) of Ethical Culture So-
ties have been active and, in many instances, in the fore-
nt of organized efforts to have the death penalty
olished throughout the United States.

11. THE UNITED PRESBYTERIAN CHURCH IN THE UNITED STATES OF AMERICA BY MRS. RALPH M. STAIR, MODERATOR AND WILLIAM P. THOMPSON, STATED CLERK OF THE GENERAL ASSEMBLY

The United Presbyterian Church adopted a statement
ndemning the death penalty at its 171st general assembly
1959 and adopted a revised statement at the 177th Gen-
l Assembly in 1965.

The United Presbyterian Church in the United States of
nerica has a membership of 3,100,000. It has 8,662
urches throughout the nation.

12. NATIONAL CATHOLIC CONFERENCE FOR INTERRACIAL JUSTICE

The National Catholic Conference For Interracial Justice is a service agency formed in 1960-61 out of the Catholic Interracial Council movement. It is an independent "lay" agency, not an official Church agency, though it is recognized by the Church and maintains close relationships with official national Roman Catholic agencies, with the leaders and structures of many local dioceses, and with a large number of religious orders of men and women.

Much of the energy of the Conference is devoted to moving the Catholic community more deeply into the struggle for interracial justice, and for the disadvantaged, and into cooperative work with other denominations and secular agencies. The Conference initiated, organized and served as secretariat for the historic 1963 National Conference on Religion and Race, involving some 70 denominational groups.

The Conference offers specialized services in the fields of employment (Project Equality), education, urban services and is initiating a new project in the field of religious ministries to the police. It serves over 150 human relations and urban service organizations sponsored by the Roman Catholic community.

13. THE NATIONAL COALITION OF AMERICAN NUNS

The National Coalition of American Nuns is an organization of Roman Catholic Sisters whose purpose is to study and speak out on issues related to human rights and social conscience. The coalition was established in July, 1969. It numbers 1,937 sisters.

SUMMARY OF ARGUMENT

The death penalty is a cruel and unusual punishment because of the inherent fallibility of every judicial proceedings. There is the possibility of the execution of an innocent man. Every stage and every aspect of the judicial proceedings reveal the wrong we do when we take human life by judicial process: we permit the defendant to plead and bargain with his own life as a counter; we force a scrupled juror to consider a penalty he disavows. The outcome of a trial sometimes depends on chance factors such as the availability and admissibility of evidence; life or death may depend on determination of complex subjective questions such as motive or the voluntariness of a confession. The judicial rules, substantive and procedural, are shifting: men have been executed on the basis of rules shortly changed. The death penalty sometimes is employed as a form of suicide; thus, instead of decreasing murder, it may increase it. The treatment of the condemned man, the wait, the setting of death dates and granting of stays all inflict unbearable torture. The execution itself is ghastly.

The evils of the death penalty are not remediable. They are inherent and can end only with the end of capital punishment.

ARGUMENT

I.

THE PUNISHMENT OF DEATH IS CRUEL AND UNUSUAL

The religious organizations support petitioners in the case at bar and three companion cases. In view of the certiorari grant, the religious organizations will consider primarily the impact of the death penalty upon the individual.

Its impact upon society we shall mention only incidentally. Yet we should note that some of the most telling arguments against capital punishment stress its negative social effects. Study after study has shown that it fails as a deterrent.[1] The death penalty is a costly waste of money, because it protracts trials, increases the number of appeals and increases custodial expense. It corrodes and brutalizes society. Some aspects of this process we shall touch on.

We assert that the death penalty for any crime is cruel and unusual punishment within the meaning of the Eighth Amendment. We focus on the death penalty for murder, but our arguments apply generally with equal force to the death penalty for rape and other crimes.

In brief compass our contention is that life ought not to stand forfeit upon human judgments. Such judgments are necessarily fallible. This proposition we think is true at every level of the judicial process: the defining of capital crimes, the making of factual determinations, the weighing of subjective factors such as motive, capacity and mental status. No judge and no jury is without bias; no judicial proceedings exempt from flaw.

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[1] For representative studies, see Bedau, *The Death Penalty in America*, Chap. 6, p. 258, et seq. (hereafter "Bedau").

We shall review pending and recent cases, not primarily for the legal principles they enunciate, but for the lessons they teach regarding the limitations of the judicial process and of man himself.

Our thesis does not rest simply on the argument often cited for abolition of the death penalty—the possibility of judicial error. It is, of course, beyond cavil that a man wrongly condemned has suffered cruel and unusual punishment. We need not speculate, moreover, on the possibility of such a fearful miscarriage of justice: it has occurred.

On March 9, 1950, Timothy John Evans was hanged in London for the murder of his wife and baby, his appeal to the Court of Criminal Appeal having been dismissed (February 20, 1950). A witness against him was his landlord, John Reginald Christie. In 1953, the bodies of Mrs. Christie and several others were found on the premises. Christie was convicted of the murder of Mrs. Christie and hanged.

Doubts immediately arose as to the guilt of Evans.[1] On October 18, 1966, Queen Elizabeth II granted Evans a posthumous pardon.[2]

Ordinarily, following an execution, there is no longer sustained interest in a case. If an injustice has been done, it is beyond recall. The legal remedies for post death exoneration are ill-defined. Hence, there are but few cases of official

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[1] For the transcript of both trials, see *Trials of Timothy John Evans and John Reginald Halliday Christie*, Jesse ed., Notable British Trials (Hodge and Co., Ltd., 1957). The judgment of the Court of Criminal Appeal in *Rex* v. *Evans* appears at p. 297. Christie did not appeal.

[2] New York Times, October 19, 1966, p. 19, Col. 3.

recognition of judicial error. Nonetheless, there is extensive literature regarding wrongful convictions in both capital and noncapital cases.[1] If we continue executions, doubtless we shall again put to death innocent men.

But our argument is more comprehensive. We think it cuts deeper, that it reveals the inherent limitations of the judicial process, particularly in capital cases. Let us look to the various stages and aspects of the criminal trial to explore more fully its pernicious effect.

The very existence of the death penalty gives the prosecution an enormous advantage. Often, in exchange for a plea of guilty, the prosecution will drop a demand for a death sentence. The defendant faces a fearful choice: shall he hazard his life to seek acquittal? Yet the defendant usually does not know precisely the strengths or the weaknesses of the prosecution's case, and, consequently, lacks full knowledge necessary for an informed decision. Even if we had full pre-trial discovery in criminal proceedings, as we do in civil proceedings, the defendant would not be in a position to predict with precision the outcome of the trial. The outcome of every trial is uncertain.

For the defendant to make a "rational" decision when he bargains with the prosecution, the issue is not whether he is in fact "innocent" or "guilty" but rather what is the *probability* that he will be found guilty or not guilty. Thus, the innocent defendant cannot afford to dismiss the negotiating process without taking a cold and calculating look at the strength and weakness of his case as it will be viewed by the court and jury. The defendant who is "guilty" must do the same. And so must the defendant who does not know

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[1] See MacNamara, *Convicting the Innocent*, 15 Crime and Delinquency 57 (1969).

whether he is "innocent" or "guilty". (Thus, suppose a possible defense of mental incompetency or self defense.) The defendant may be called upon to make a crucial decision even though woefully ill-equipped to do so.

The death penalty is for some, not a punishment for murder, but a punishment for refusing to plead guilty to murder.[1]

Indeed, there is the grim possibility that a prosecutor who threatens to ask for the death penalty as a device to obtain a plea of guilty may feel forced to make such a demand if the defendant insists upon trial. In such case the death penalty may be sought not because the prosecutor feels that it is appropriate, or that he wishes it, but as an unfortunate concomitant of an unsuccessful negotiating session.

We are aware of the decisions in *North Carolina* v. *Alford*, 400 U.S. 25 (1970) and *Brady* v. *U.S.*, 397 U.S. 742 (1970) upholding pleas of guilty against claims that they were induced by fear of the death penalty. The Eighth Amendment question here at bar, however, was not there before this Court. The defendants there did not receive death sentences. Here, the broader issue, in light of the certiorari grant, is the death penalty as such. Its use as a coercive tactic to obtain guilty pleas, and its imposition where the defendant declines to plead guilty and hazards trial, present issues different from *Alford* and *Brady*.

The moral conflict of the scrupled juror. We move to the jury selection stage of the trial. The decision of this Court in *Witherspoon* v. *Illinois*, 391 U. S. 510 (1968) bars exclu-

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[1] In Illinois we are aware of but one case in recent years where a capital sentence was imposed upon a plea of guilty, *People* v. *Wilson*, 29 Ill. 2d 82, 193 N E 2d. 499 (1963). Wilson was not, however, executed.

sion of veniremen simply because they have conscientious scruples against the death penalty. Assuming that such prospective jurors are not removed by peremptory challenge by the prosecution, such jurors are faced with a moral dilemma of substantial proportions. In what circumstances should they lay aside their scruples in order to entertain or impose a punishment which they think morally wrong?

We point up this dilemma not to criticize *Witherspoon*. Many of the religious organizations participating in this amicus brief participated as amici in *Witherspoon*. We think that a jury selected by the *Witherspoon* standard is a fairer jury than one selected by the former rule. It does not, however, contain a full cross section of the public, since it excludes those with fixed and unchangeable scruples. Moreover, when a *Witherspoon* jury is composed wholly or partly of those holding scruples less fixed, a death verdict will be returned only where scruples are overcome.

The trial: the role of chance. We turn to the evidentiary phase of the criminal trial. A criminal trial is a search for the truth, but a stylized search conducted pursuant to rules. In the generality these rules operate insofar as possible to secure reliable, trustworthy evidence. But the very rule that operates to the advantage of one defendant can work to the disadvantage of another who may be on trial for his life. Assume a defense of alibi. If the alibi witness dies before trial, the defense collapses. If the witness lives, but happens himself to have a criminal record, his credibility may be destroyed and no doubt the alibi defense will fail.

Much may depend upon whether crucial evidence has been preserved and whether it is still available to counsel for the defense. This in turn may depend upon how soon after the crime counsel was obtained or it may depend upon

sheer matters of chance. In the fairest of trials fortune plays a large role, favoring now the prosecution and now the defense. Given the most skilled and diligent attorney, the most learned and fairest of judges, the most able of juries, the outcome of a criminal trial may nonetheless be determined by the fall of chance.

In civil litigation the parties have full opportunity to explore, in advance of trial, the opposite party's case. In criminal trials, while the scope of discovery has expanded recently, it is generally less extensive. The defendant may be informed of the witnesses who may be called, but often has no way to compel them to reveal in advance what their testimony may be. True, the law directs the prosecution to reveal evidence favorable to the accused. But unless the defendant learns of the suppressed evidence by fortuitous events, these rules are difficult to enforce.

In the battle, the state has a full range of technical and scientific resources. The defendant usually is granted no such assistance.

Today, skilled representation is rarely enough. Successful defense often requires not only skilled counsel, but also a corps of pathologists, chemists, physicians and other experts, if a crime is to be thoroughly explored and a full defense presented. Yet the state usually provides none of this for the accused. The facts generally must be dug out by counsel.

The trial: subjective determinations. The determination of "objective facts" in a trial is a baffling undertaking. Additionally, nearly every trial requires a determination of the subjective mental state of the accused, sometimes as to several issues. We know so little of the science (or art) of making such a determination that life should not stand forfeit through them.

Let us consider a case in this Court, *Alcorta* v. *Texas*, 355 U. S. 28 (1957). Alcorta came upon his wife one evening in a parked car kissing Castilleja. Alcorta killed his wife. The case came up under the law of Texas, under which, if Alcorta was guilty of murder without malice (a murder arising from "a sudden passion from an adequate cause"), the maximum penalty was five years. The jury, however, found Alcorta guilty of murder with malice. The sentence was death. The jury sat in judgment essentially on a subjective issue: What was Alcorta's reaction to the scene in the car? Or, perhaps more precisely, what should have been the limits of his reaction had he been a reasonable man? The issue was decided unfavorably to Alcorta. The difference was not only the difference between life and death, but the difference between a relatively mild sentence and death. Was the jury aware fully of the social group in which the Alcortas lived? Was Mrs. Alcorta's conduct regarded as heinous in that group? We do not know; we do not know whether the jury knew.

There is another element in the case: At the trial Alcorta testified that he had reason to believe that his wife had been intimate with Castilleja. Such testimony of course raises a new area of inquiry. How "reasonable" were Alcorta's suspicions? In the actual case it turned out that Castilleja had informed the prosecution that he had in fact been intimate with Mrs. Alcorta and accordingly Alcorta's suspicions were well founded. This fact was not presented to the court and jury and, indeed, Castilleja denied having any more than a casual relationship with Mrs. Alcorta. Because of this act of deception, Alcorta's conviction was upset by this Court.

The Alcorta jury was asked to make not an objective but a subjective determination. Subjective determinations take

a myriad of forms: Suppose, for example, a defense of justification. What is a "reasonable belief" that force was necessary in self defense? The defense of insanity and the defense of incapacity to form a specific intent are other illustrations.

The question of subjective determinations may be viewed from another perspective. The Commandment is "Thou shalt not kill." But not all who kill are equally culpable. The law establishes gradations of homicide. These gradations are variously phrased from state to state ("degrees" of murder, etc.). Similarly, there are various defenses, likewise variously described. The law necessarily compresses these gradations and defenses into a few categories. But the circumstances of life are manifold, the causes of each homicide as complex as human personality itself.

The voluntariness of confessions. Determining the voluntary character of a confession, of course, requires a subjective determination. A jury is asked to judge in the quiet of the court room the effect of a given interrogation upon a man whom they do not know. They learn of him as a person only through the testimony of partisan witnesses, given under the stress of trial relating to events which almost invariably are hotly disputed. Consider the case of Charles Townsend. He was first arrested on a murder charge on January 1, 1954 and has been incarcerated continuously since then. He has been on death row for 16 years, 4 months (since April 7, 1955). His case is now the oldest case in the nation. Counting from his first arrest, it is probably the longest capital case in American history (17 years, 7 months). His case was last in this Court in 1963 (*Townsend* v. *Sain,* 372 U.S. 293).

Townsend was convicted of murder and sentenced to death by the Criminal Court of Cook County. Characteriz-

ed by the prosecution as a near mental defective, he was arrested one evening and soon began to suffer withdrawal symptoms. A prison physician administered scopolamine, a drug commonly known as "truth serum." Within an hour and a half after the administration of this drug Townsend confessed to four murders and two robberies. He was tried for one murder and acquitted. He was then tried for the second murder and sentenced to death. The evidence of his guilt, apart from the confession, was simply that one Campbell testified that about the middle of December (the murder took place on December 18, 1953), he saw Townsend walking down the street in the vicinity of the murder with a brick in his hand. A pathologist testified that death was caused by a severe blow to the head of the deceased. The Supreme Court of Illinois affirmed the conviction despite the meagerness of the evidence. Two dissenting justices declared the testimony inherently incredible. Townsend, through counsel serving without fee, then sought relief in the federal court charging that the state suppressed the fact that the drug scopolamine, which its witnesses referred to as hyoscine, was known as truth serum. After numerous appellate proceedings, this Court directed that the District Court give Townsend a hearing.

Further litigation ensued. Only this year, the District Court, for a second time, set aside Townsend's conviction and ordered his release on bond. *U. S. ex rel Townsend* v. *Twomey,* 322 F. Supp. 158 (1971). (The Seventh Circuit has stayed the bond release order.)

The second oldest case on death row is the case of Edgar Smith. Smith was sentenced to death on June 4, 1957, for the murder of a 14 year old girl. For years he fought vigorously in the courts to set aside his conviction. (For unsuccessful attempts, see *U. S. ex rel Smith* v. *New Jer-*

sey, 322 Fed. 2d 810 (CA 3rd, 1963) and *U. S. ex rel Smith* v. *Yeager,* 395 Fed. 2d 245 (CA 3rd, 1968). (Judge Biggs dissented from the denial of a plenary hearing and Judge Freedman from the denial of a rehearing *en banc.* The course of the litigation is traced in 395 Fed. 2d at 247).

On June 8, 1971, the United States District Court for New Jersey, after a plenary hearing, overturned the conviction. Smith was ordered released on bond (Chicago Sun Times, June 9, 1971, p. 18). The Third Circuit, on an expedited appeal, affirmed the order setting aside the conviction, but declined to release Smith on bond.

Perhaps the State will seek certiorari. The merits of the case need not concern us. What must give us pause is that after 14 years a court has ruled that Smith was unjustly convicted. Had he been executed, the error could not have been righted.

The District Courts in both *Townsend* and *Smith* entered bond release orders. These orders illustrate another aspect of the death penalty: Once a defendant wins the right to a retrial, his case often is seen in a new perspective. The crime itself is no longer viewed as one warranting the death penalty, or the quantum of evidence of guilt seems diminished. Other illustrations: James V. Giles and John G. Giles, not long after the decisions of this Court (*Giles* v. *Maryland,* 386 U.S. 66 (1967)) and the Maryland Court of Appeals, *State* v. *Giles,* 245 Md. 342, 227 Atl. 2d 745 (1967) were ordered released on $10,000 bail pending retrial. (N. Y. Times, July 6, 1967, p. 27). Edgar Labat and Clifton A. Poret, sentenced to death for rape in 1953, won a retrial. *Labat* v. *Bennett,* 365 Fed. 2d 698 (CA 5th 1966). In 1969, they pleaded guilty to aggravated rape and were sentenced to the 16 years, 9 months already spent on death row. (N. Y. Times, December 30, 1969).

We have emphasized the subjective elements of every trial. We do not wish to rule out subjective determinations in criminal trials. There is a difference recognized by the law and recognized by mankind generally between a homicide committed as the law used to say, "with malice aforethought" and a homicide committed innocently or negligently or even recklessly. Surely different punishments are in order for these various crimes. But we say, questions of human motivation, responsibility, ability to withstand interrogation, effects of narcotics and alcohol upon the human system, etc., are matters of extraordinary complexity. Medicine generally, and psychiatry in particular, have been able to supply only a feeble light in some areas of these problems. We can, it seems to us, in good conscience reconcile ourselves to the necessity for the resolution of these questions as best they can be resolved by a court or by a jury. Such resolution is necessary as part of the price of human society. But we are tragically in error when we rest decisions of life and death upon these fallible judgments. We exact a price from the individual which society does not need for its protection.

In past years, with unconscious irony, but in light of what we have said, not without justification, the Government used to classify executions among the accidental deaths. (See Statistical Abstract of the United States, 1951, Table 74, p. 69, Footnote 12 for 1900, 1910 and 1920.). Today they are classified among "homicides" by the United States Public Health Service. (Statistical Abstract of the United States, 1970, table 220, p. 145).

Shifting judicial rules, substantive and procedural. We turn to another area: shifting judicial cencepts of the capital crime. The Caryl Chessman case is an illustration. (For a procedural aspect of the case, see *Chessman* v. *Teets*,

354 U. S. 156 (1957)). Chessman was sentenced to death not for murder—he killed no one—but for "kidnapping" during an armed robbery in which the victim suffered bodily harm.

The Supreme Court of California declared that, "It is the fact, not the distance, of forcible removal which constitutes kidnapping . . ." (*People* v. *Chessman*, 38 Cal. 2d 166 at 192, 338 P. 2d 1001 (1959)). Nine years after Chessman was executed in 1960, the Supreme Court of California disaffirmed this construction of the statute (*People* v. *Daniels*, 71 Cal. 2d 1119, 80 Cal. Rept. 897, 459 P. 2d 225 (1969). For the latest development see *People* v. *Mutch*, 93 Calif. Rept. 721, 482 P. 2nd 63 (March 24, 1971).

For an analogous shift in the law, but procedural, rather than substantive, consider the case of Vincent Ciucci. The state alleged that Ciucci shot his wife and three children in order to marry another woman. The state elected not to try Ciucci for all four murders simultaneously. Instead he was first tried for the murder of his wife for which he received a sentence of twenty years. He was then tried for the murder of one child for which he received a sentence of 45 years. Not until he was tried for the murder of the second child did he receive the death penalty, the goal sought at the beginning by the state. This Court in a five to four decision declared that under Illinois law each murder was a separate crime for which Ciucci constitutionally could be indicted and tried separately. (*Ciucci* v. *Illinois*, 356 U.S. 571 (1958)). Ciucci was executed in 1962.

Not long afterward the Supreme Court of Illinois disapproved the practice challenged in *Ciucci*. *People* v. *Golson*, 32 Ill. 2d 398, 207 NE 2d 68 at 75 (1965).

Indeed, even before the execution of Ciucci, Illinois, in 1961, adopted a criminal code requiring that all offenses

known to the prosecuting officer must be prosecuted in a single prosecution. Illinois Rev. Stats. (1971) C.38, §§ 3-3(b), and 3-4). (See the comment of the Joint Committee to Revise the Illinois Criminal Code which appears after Section 3-3 in Smith-Hurd Illinois Statutes Annotated).

Recent death penalty cases in this court: due process aspects. In recent years this Court has had before it four cases challenging procedural aspects of capital cases. *Witherspoon* v. *Illinois*, 391 U. S. 510 (1968); *Maxwell* v. *Bishop*, 398 U.S. 262 (1970); *McGautha* v. *California*, 29 L. ed. 2d 711 (1971) and *Crampton* v. *Ohio*, 29 L. ed. 2d 711 (1971). Every one of these cases raises grave due process questions *apart from the issues presented in this Court.*

Consider *Witherspoon.* In 1963, when the Illinois Supreme Court upheld Witherspoon's death sentence, it granted the request of his court appointed attorney to be relieved of further responsibility. Witherspoon thus was facing the chair with substantial legal channels still open and a right to seek clemency, but without a lawyer. This Court declined a request to appoint counsel. Witherspoon applied to the Illinois Supreme Court to appoint counsel. It promptly did so but the 90 days allowed by law for certiorari had expired. Witherspoon obtained other counsel who conducted a protracted battle in his behalf. After these attorneys had exhausted their efforts, Witherspoon, still under sentence, from his prison cell wrote his own petition which he mailed to the Federal District Court. The District Court appointed counsel to represent him. They successfully carried the case here. This Court declared Witherspoon's death sentence indeed unlawful and ultimately the Supreme Court of Illinois reduced the sentence to a prison term.

For Maxwell, it was a substantial struggle to obtain the right to appeal from the denial of Federal habeas relief

and to stave off execution long enough for the case to be heard.

The District Court denied a certificate of importance and a stay of the execution then set for September 2, 1966. The Court of Appeals declined to grant a certificate or a stay. Mr. Justice White granted a stay late in the evening on September 1. During the October Term, 1966, this Court ordered the Court of Appeals to consider the case. It did so but denied relief. (See 385 U. S. 650 (1967), 398 Fed. 2d 138 at 140 (1968)). Ultimately the case reached this Court (393 U. S. 997 (1968)) raising the two questions later to be decided in *McGautha* and *Crampton*. This Court, however, did not pass upon those issues, but rather remanded the case to the lower courts for resolution of *Witherspoon* questions.

In *McGautha* there is a question whether McGautha or his co-defendant, Wilkinson, fired the fatal shot. (*McGautha*, 29 L ed. 2d at 715). The Courts below appear to have resolved this issue against McGautha and evidently on this basis Wilkinson received a prison term, whereas McGautha received the death penalty. Suppose, however, as McGautha claims, the Courts are wrong! Suppose that Wilkinson fired the fatal shot but falsely accused McGautha in order to save himself!

The Crampton case is an incredible story. Crampton spent years in prison. In September 1967 Crampton's wife, because of his amphetamine addiction, bizarre behavior, and knife threats to her, persuaded him to commit himself to a state mental hospital. In November, 1967, a state hospital physician noted on the chart: "*Prognosis:* Guarded. *Dangers and Warnings:* Under stress, patient could be dangerous to his wife." (R. p. 20 in *Crampton*, O. T. 1970, No. 204). Nonetheless, within a month he was sent home on

Christmas furlough. He overstayed the furlough. Apparently the authorities did not bother to pick him up. He threatened his wife; the police picked him up but released him. By January 17, 1963, he had murdered his wife. Yet a defense of insanity was rejected. What measure of responsibility does the state bear for the death of Mrs. Crampton?

Near the end of the last term this Court set aside the death sentences and remanded for reconsideration several cases in light of *Witherspoon*. Some of these cases too are profoundly disturbing apart from Witherspoon questions.

Witherspoon itself declared that it was retroactive. Several capital defendants had cases on appeal to the Supreme Court of Tennessee. They sought to raise *Witherspoon*, but the 90 days then allowed by statute for filing bills of exceptions had expired. The Supreme Court of Tennessee affirmed the convictions without considering *Witherspoon*, even though it promulgated a constitutional rule. Apparently there was no way to raise the issue in the Tennessee Courts. Upon amendment of the statute, this Court, on certiorari, remanded for reconsideration, *Hunter* v. *Tennessee*, ... U.S. ..... (June 28, 1971).

In *Tajra* v. *Illinois* and *Bernette* v. *Illinois*, ... U.S. ..... 39 L. W. 3566 (June 28, 1971) Martin Tajra and Herman Bernette were indicted for murder. It was the state's theory that Tajra had provided Bernette with a gun and sent him to carry out a robbery. Bernette entered the premises and in the course of the robbery committed a murder. Tajra and Bernette were tried separately. Tajra, sentenced to a prison term, appealed to the Illinois Appellate Court. Bernette was sentenced to death. On appeal to the Supreme Court of Illinois that Court reversed and remanded Bernette's conviction for various trial errors.

People v. *Bernette*, 30 Ill. 2d 359, 197 N E 2d 436 (1964). On Tajra's appeal to the Illinois Appellate Court, that Court held that since the same errors had occurred in Tajra's trial as in Bernette's, he too was entitled to a new trial. *People* v. *Tajra*, 58 Ill. App. 2d 479, 208 N E 2d 9 (1965).

On the second trial, Tajra was sentenced to death. This conviction was appealed to the Supreme Court of Illinois which did not exercise its power to reduce the sentence to a term of years. *People* v. *Bernette* et al., 45 Ill. 2d. 227, 258 N E 2d 793 (1970).

Bernette, ... U.S. ....., 39 L. W. 3566 (June 28, 1971), a black, is a mental defective. Sometime after his conviction he became mentally ill and since January, 1968, has been confined in an institution for the mentally ill. Nonetheless, the Supreme Court of Illinois about 18 months after he had been removed to a mental hospital affirmed his conviction for murder. No note was taken, apparently, of the fact that he had been in a mental institution, nor did the Supreme Court exercise its prerogative to reduce the sentence. *People* v. *Bernette*, 45 Ill. 2d 227, 258 N E 2d 793 (1970).

Prosecution suppression of evidence favorable to accused. The Lyman Moore case now before this Court on certiorari *Moore* v. *Illinois* (cert. gr. June 28, 1971 No. 69-5001) is an instance where the prosecution was aware of but failed to reveal to defendant evidence favorable to him. Moore, now under sentence of death for murder, was arrested for the crime some months after it took place. In the interim the police sought one "Slick" who had boasted of the murder to a bartender shortly after the crime. The bartender informed the police that prior to the boast, he had seen "Slick" at a time when the defendant was in a Federal

prison. Yet this information was never revealed to defense counsel. Had this information been revealed, the bartender's identification of the defendant as "Slick" would have been shaken. This fact, coupled with substantial evidence that at the time of the murder Moore was at work in a distant portion of the Chicago area might have meant acquittal. (See further the amicus brief filed by present counsel in the *Moore* case).

It seems almost past belief that the prosecution would suppress evidence favorable to an accused in a criminal case. Yet there have been repeated instances of such practice even in capital cases. See e.g. *Miller* v. *Pate*, 386 U. S. 1 (1967). (False representation of paint stains on shorts as blood) *Brady* v. *Maryland*, 373 U. S. 83 (1963). (Statement of accomplice that he, not defendant, had shot deceased); *U. S. ex rel Thompson* v. *Dye*, 221 F 2d 763 (CA 3rd 1955), cert. den., 350 U. S. 875 (1955). (Officer testified that defendant was not drunk. Prosecution suppressed contrary testimony of other officers). *U. S. ex rel. Almeida* v. *Baldi*, 195 F. 2d 815 (CA 3rd 1952) cert. den. 345 U. S. 904 (1953) (Prosecution permitted false inference that defendant fired fatal shot); *Ashley* v. *Texas*, 319 F. 2d 80 (CA 5th 1963), cert. den. 375 U.S. 931 (1963) (State failed to reveal medical report that defendant was incompetent); *U. S. ex rel Meers* v. *Wilkins*, 326 F.2d 135 (CA 2d 1964) (Robbery. Prosecution failed to produce eyewitnesses who stated defendant not the robber).

Barbee v. *Warden*, 331 F2d 842 (CA 4th, 1964) (Prosecution permitted false inference that defendant's gun was the lethal weapon); *Turner* v. *Ward*, 321 F2d 18 (CA 10th, 1963) (Suppression of nature of sex attacks); *U. S. ex rel Butler* v. *Maroney*, 319 F2d 622 (CA 3rd 1963) (Suppression during guilt phase of trial of evidence that a struggle

preceded shooting); *Levin* v. *Katzenbach*, 363 F2d 287 (D. C. Cir. 1966) (Bank officer's knowledge of key incidence suppressed); *McMullin* v. *Maxwell*, 3 Ohio St. 2d 160, 209 N E 2d 449 (1965) (Suppression of favorable ballistics report); *Application of Kapatos*, 208 F. Supp. 883 (N. Y. 1962) (Witness's statement that defendant not the murderer); *U. S. ex rel Montgomery* v. *Ragen*, 86 F. Supp. 382 (1949) (Rape case. Suppression of medical report that no rape occurred.)

The four cases at bar: due process aspects. The four cases here at bar raise troublesome questions apart from *Witherspoon* and apart from the Eighth Amendment question. These questions are set out in the petitions for certiorari. Here we will but mention that Aikens waived jury trial at a time when scrupled jurors would have been excluded. Jackson and Branch were sentenced to death for rape. Both are black; both victims, white. Furman and Jackson were sentenced to death after unitary trials. Now the unitary trial in Georgia has been replaced by a two stage trial. (Brief for Respondent in Opposition to Petition for Certiorari, p. 10, in *Jackson*). Thus the trials of both Furman and Jackson, apart from *McGautha*, no longer meet Georgia standards. Should they go to their deaths? Furman's trial lasted but a day.

We have mentioned above the development of the criminal law. Only a generation ago, Illinois executed two men without any appellate review. At that time, Illinois law granted a right of review in the Supreme Court of Illinois to everyone convicted of a felony, except in capital cases. In such cases, review was only by leave of Court. Ill. Rev. Stats. (1951), C. 38, §§ 769 and 769.1. Review was denied to Willard Truelove, and on November 17, 1950, comatose, he was dragged to the electric chair at the Cook County

Jail. Harry Williams similarly was denied review and denied a hearing on the constitutionality of the discrimination. (342 U.S. 934 (February 4, 1952)). He was executed on March 14, 1952.

The very next year the law was changed. Ill. Rev. Stats. (1953) C. 38, § 769.1. Today would we for a moment countenance execution without appellate review? What practices today considered just will we regard tomorrow as a barbarism and wonder that they persisted so long?

The death penalty and suicide. The death penalty raises another deeply disturbing problem. There appear to be some individuals who commit murder in order to receive the death sentence. They ask the state to do for them what they hesitate to do for themselves. In these situations, the death penalty, rather than discouraging murder, appears actually to encourage it. We do not have to speculate as to whether such cases arise. This Court has had first hand experience with the matter. *Rees* v. *Peyton*, 384 U. S. 312 (1966) is such an instance. Rees was sentenced to death. At sentencing Rees said to the judge, "Thank you." Counsel sought review here on certiorari. After the petition had been filed, Rees wrote to this Court and to counsel asking that the petition be withdrawn and all legal efforts halted. The Court ordered inquiry into Rees's mental status.

Another illustration: In 1957, Jack Chester after a long upsetting love affair, killed his fiance. His death sentence was upheld by the Supreme Judicial Court. (*Commonwealth* v. *Chester*, 337 Mass. 702, 150 N E 2d 914) on June 10, 1958. The sequel is related by Dr. Frederick Wiseman: "Chester, aware of commutation efforts on his behalf, wrote to the Governor asking that clemency be denied. He wanted death, not as punishment but as mercy." The responsible authorities recommended commutation. "When told that

the Governor was about to approve their recommendations, [Chester] hanged himself." (Wiseman, *Psychiatry and Law, Use and Abuse of Psychiatry in a Murder Case,*" American Journal of Psychiatry, Oct., 1961, p. 289.

Other recent cases in which a condemned man sought execution are set out in the footnote.[1]

The condemned man, the wait and the execution. In the foregoing pages, we have said much about the criminal proceedings but little about the condemned man. How does he fare? As of December 31, 1968, the median elapsed time for prisoners then under sentence was 33.1 months (NPS

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[1] Andrew Pixley filed a plea of guilty to a murder charge. Upon being sentenced to death, he stated he did not wish to appeal. After his attorneys nevertheless filed an appeal, he wrote to the Wyoming Supreme Court that he wanted no appeal and wished the attorney dismissed (*Pixley* v. *State,* 406 P. 2d 662, at 665, October 19, 1965). The Court heard the appeal nonetheless and affirmed. Pixley was executed on December 10, 1965.

James Donald French, a prisoner, strangled his cellmate. After he was sentenced to death, counsel filed an appeal. Judge Bussey in a concurring opinion stated the defendant "has urged this Court to dismiss his appeal and allow him to be executed, in accordance with the judgment and sentence imposed upon him." *French* v. *State,* 377 P. 2d. 501 (Oklahoma, 1961). The Court nonetheless reversed. A second conviction likewise was reversed. 397 P. 2d. 909 (Oklahoma, 1963).

At the third trial, French "freely admitted the bizarre details of the slaying . . . and described in minute detail the facts and circumstances. . . ." 416 P. 2d. 171 at 178 (Oklahoma, 1966).

After the third conviction, French wrote to the Clerk of the Supreme Court asking that his court appointed attorney be relieved. French was executed August 10, 1966.

For earlier accounts where capital punishment has been employed as a form of suicide, see Sellin, *The Death Penalty* 65 (1959).

Capital Punishment Bulletin, No. 45, August 1969) (Latest published). In Maryland the median was 79 months (the longest) and in Ohio and Kentucky, 16 months (the shortest). Doubtless these medians have since lengthened. But these statistics do not convey the full horror. Generally it appears that men on death row are kept segregated, usually in small cells a few yards from the execution chamber. They do no work. Their opportunities for exercise and recreation are limited.[1] For years a living human being is treated as if dead. He is no longer functionally a member of the community of the living. He lives thus for months or years. Under this regimen some men cease to be men.[2] But the condemned is not allowed to end his suffering himself.[3] The moments preceding the execution are horrible.[4] The execution itself ghastly.[5]

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[1] The routine at San Quentin is described by a condemned man in *N. Y. Times*, July 23, 1971, p. 31. For the routine in New Jersey and New York, see N. Y. Times, May 5, 1971, p. 41.

[2] See Gottlieb, *Capital Punishment*, 15 *Crime and Delinq.* 8 (1969).

[3] Rigid suicide precautions are customary. Gottlieb, *Capital Punishment*, 15 *Crime and Delin.* 8 (1969). Amici Synagogue Council, et al., in *Maxwell* v. *Bishop*, O. T. 1969, No. 13, make the point that the state insists not on death but on the opportunity to put to death a man aware of the event. The sick are cured and insane, if possible, brought to lucidity to achieve this end. This is not punishment but vengeance.

[4] Aaron C. Mitchell, the last man executed in California, we are told, was carried moaning to the gas chamber. His last audible words were, "I am Jesus Christ." (*N. Y. Times*, April 13, 1967, p. 13; Chicago Tribune, April 13, 1967, Sec. 1, p. 8).

[5] See Thomas Gallagher, *Invitation to a Killing*, *N. Y. Herald Tribune*, February 7, 1965.

There is another matter we must touch on. Dostoevsky relates the awful events of December 22, 1849, when he and two comrades were led to the place of execution, ordered to don the white execution shirts and tied to posts. At the last moment, they were untied and informed that the Czar had spared their lives and sentenced them to penal servitude.[1] Almost as unbelievable as the actual event is the nearly incredible fact that it was carefully planned by Czar Nicholas I personally. We would not impose calculated anguish in this fashion as did an autocrat. Yet in the course of granting a condemned man a full measure of due process, we inflict a pain similar to that inflicted on Dostoevsky. A man is condemned and an execution date set. A stay is granted pending appeal. The conviction is affirmed and a new date set. As the proceedings continue, there are new dates and new stays. We do not for a single moment suggest that a condemned man be denied every access to the Courts. The bitter experience of the past makes clear that justice sometimes prevails only after many lost battles. But in the course of doing justice we inflict agony. Not by intent, but by the inherent nature of the system created to do justice.[2]

Summation. Before concluding, we must call attention to the special problems of the cause célèbre. They subject the judicial process to a peculiar torment, and, when they are capital cases, raise doubts never wholly dispelled. Sacco and Vanzetti, the Rosenbergs and Chessman are cases known to all. Other cases are causes célèbre in their region, although not known nation-

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[1] For an account of the event by Dostoevsky, see Mochulsky, *Dostoevsky, His Life and Work,* 140 (Princeton U. Press, 1967).

[2] For but one example, consider the cases of Labat and Paret as related in *Labat* v. *Bennett,* 365 F. 2d. 698 (CA 5th, 1966).

ally. So long as we retain the death penalty, men will go to the grave, not for what they have done, or perhaps not solely for what they have done, but because of who they are, or who the world thinks they are, or because of the domestic or international passions of the times.

Initially we stated as our premise the inherent fallibility of every judicial proceeding. We have traced a number of recent cases to explicate that proposition. Yet one might say that our thesis merely sets out a collection of disparate evils, each subject to remedy, some already remedied. This view misconceives the thrust of our argument. If we correct the evils we see today, tomorrow we would recognize further flaws in the proceedings of today. The evils of today are manifest; they must give us pause: the defendant's plea bargaining with his own life; the scrupled juror asked to lay aside his scruples to vote for death; the possibility of exonerating evidence being lost or simply excluded by the rules of evidence; the numerous shocking instances of prosecution suppression of evidence favorable to the accused; the unsureness in judging subjective questions; doubts as to the voluntariness of confessions; shifting definitions of capital crimes; shifting concepts of due process; last minute stays of execution followed by subsequent reversals; the sentencing to death of mentally ill men. We could readily enlarge our list. Today we would not countenance the execution of a man without appellate review of his case. Tomorrow the practices of today will seem equally unthinkable. Progress sometimes is slow; there is backsliding. Yet today we do know more about man than we did; we venture to think we are less ready to take life. Indeed, perhaps the decline in executions, and more recent halt, is an indication of our growing awareness of our limitations.

Since 1930, we have executed 3859 persons. It is sobering to realize that scarcely any of their trials would survive review today. *Witherspoon* and *Miranda* doubtless would fault the majority. The 3859 men and women we submit have suffered cruel and unusual punishment. Should we continue executions when their deaths are witness to the error of the practice?

We mentioned early in our brief that the death penalty corrodes and brutalizes us. The foregoing account, we think, reveals clearly the fashion in which the death penalty degrades us. It is not only in the imposition of the penalty per se that we are degraded, it is also in the wrongs we tolerate (some just mentioned) in capital cases. It is not alone the condemned man who suffers a cruel and unusual punishment; it is we as well, we in society, who inflict a cruel and unusual punishment on ourselves.

In the sciences, man long ago learned that absolutes elude him. Every advance of knowledge teaches that the world is more subtle than we thought. In the macrocosm we learn that the universe is vaster than we thought, that complex phenomena occur in what we thought a void, that space and time once thought wholly separate are subtly linked. In the microcosm with each more powerful accelerator we discover new subatomic particles and learn of more complex relationships between them.

Even logic and mathematics have not escaped. In the last century we learned that even one of the "self-evident" postulates of Euclid was open to question. Today we accept both Euclidean and non-Euclidean geometries. In our day, Ernest Nagel and James R. Newman tell us,[1] a

[1] 4 *The World of Mathematics, 1668* (1956)

1936 paper by Kurt Goedel came as an "astonishing and melancholy revelation to mathematicians," because it challenged deeply rooted preconceptions concerning mathmatical method.

If the "exact sciences" are thus inexact, what of the criminal law? An ordered society needs the criminal law for its protection; it needs incarceration for some; it does not need to kill anyone for its own protection.

The death penalty is cruel and unusual punishment, because the judicial procedures which would truly warrant and justify such a penalty are beyond man. Such judicial procedures are beyond man, because man is man, imperfect in experience, imperfect in wisdom, imperfect in understanding of his fellow man.

Joseph K, just before being put to death at the end of Kafka's novel, *The Trial,* declares

> "Were there arguments in his favor that had been overlooked? Of course, there must be. Logic is doubtless unshakeable, but it cannot withstand a man who wants to go on living. Where was the Judge whom he had never seen? Where the High Court to which he had never penetrated? He raised his hands and spread out all his fingers." (Knopf, 1959, p. 286).

We can tolerate an imperfect justice if we do not take life, because of the need to protect society. But, we cannot tolerate imperfect justice when we inflict an irreversible penalty.

Moses, shortly before his death, in his final charge to his people declared,

> "Today I offer you the choice of life and good, or death and evil. . . . I offer you the choice of life or death, blessing or curse. Choose life. . . ." (Deut. 30:15-19)

We ask this Court, too, to choose life and good.

Respectfully submitted,

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APPENDIX

Policy Statements Opposing the Death Penalty Adopted By Amici and Other Religious Organizations

NATIONAL COUNCIL OF THE CHURCHES OF CHRIST IN THE UNITED STATES OF AMERICA POLICY STATEMENT

ABOLITION OF THE DEATH PENALTY

Adopted by the General Board
September 13, 1968

In support of current movement to abolish the death penalty, the National Council of Churches hereby declares its opposition to capital punishment. In so doing, it finds itself in substantial agreement with a number of member denominations which have already expressed opposition to the death penalty.

Reasons for taking this position include the following:

(1) The belief in the worth of human life and the dignity of human personality as gifts of God;

(2) A preference for rehabilitation rather than retribution in the treatment of offenders;

(3) Reluctance to assume the responsibility of arbitrarily terminating the life of a fellow-being solely because there has been a transgression of law;

(4) Serious question that the death penalty serves as a deterrent to crime, evidenced by the fact that the homicide rate has not increased disproportionally in those states where capital punishment has been abolished;

(5) The conviction that institutionalized disregard for the sanctity of human life contributes to the brutalization of society;

(6) The possibility of errors in judgment and the irreversibility of the penalty which make impossible any restitution to one who has been wrongfully executed;

(7) Evidence that economically poor defendants, particularly members of racial minorities, are more likely to be executed than others because they cannot afford exhaustive legal defenses;

(8) The belief that not only the severity of the penalty but also its increasing infrequency and the ordinarily long delay between sentence and execution subject the condemned person to cruel, unnecessary and unusual punishment;

(9) The belief that the protection of society is served as well by measures of restraint and rehabilitation, and that society may actually benefit from the contribution of the rehabilitated offender;

(10) Our Christian commitment to seek the redemption and reconciliation of the wrong-doer, which are frustrated by his execution.

Seventy-five nations of the world and thirteen states of the United States have abolished the death penalty with no evident detriment to social order. It is our judgment that the remaining jurisdictions should move in the same humane direction.

In view of the foregoing, the National Council of Churches urges abolition of the death penalty under federal and state law in the United States, and urges member denominations and state and local councils of churches actively to promote the necessary legislation to secure this end, particularly in the thirty-seven states which have not yet eliminated capital punishment.

103 For 0 Against 0 Abstentions

AMERICAN BAPTIST CONVENTION
Statement on Capital Punishment

Adopted: Rochester, New York, June 7, 1960

IV. NATIONAL AFFAIRS, 4. Capital Punishment

1. Because the Christian believes in the inherent worth of human personality and in the unceasing availability of God's mercy, forgiveness, and redemptive power, and
2. Because the Christian wholeheartedly supports the emphasis in modern penology upon the process of creative, redemptive rehabilitation, rather than on punitive and primitive retribution, and
3. Because the deterrent effects of capital punishment are not supported by available evidence, and
4. Because the death penalty tends to brutalize the human spirit and the society which condones it, and
5. Because human agencies of legal justice are fallible, permitting the possibility of the executing of the innocent,

We, therefore, recommend the abolition of capital punishment and the re-evaluation of the parole system relative to such cases.

Recog[illegible]ing that at present some states (namely, Alaska, Delaware, Hawaii, Maine, Michigan, Minnesota, North Dakota, Rhode Island, and Wisconsin) have abolished the practice, we encourage Christians to support groups and agencies working for its abolition in the remaining forty-one states.

As capital punishment is abolished, we recognize that society must be protected against release from prison of those whose unredeemed spiritual life, or whose condition of physical or mental health, would endanger others.

We look with favor upon the renewed efforts in our time to abolish capital punishment, urge our members

individually, and our Monthly and Yearly Meetings to unite with others in the task of removing the death penalty from the statute books of the various states, provinces and central or federal governments, and the United Nations.

LUTHERAN CHURCH IN AMERICA

Statement On Capital Punishment

Adopted by the Third Biennial Convention
Kansas City, Missouri
June 21-29, 1966

Within recent years, there has been throughout North America a marked increase in the intensity of debate on the question of abolishing the death penalty. The situation has been accompanied by the actual abolition of capital punishment in ten states and two dependencies of the United States, qualified abolition in three states, and in six states a cessation in the use of the death penalty since 1955. Although the issue of abolition has been widely debated in Canada in recent years, a free vote in Parliament on April 5, 1966, failed to end the legality of the death sentence. However, during the last two years or more, death sentences in Canada have been consistently commuted.

These developments have been accompanied by increased attention to the social and psychological causes of crime, the search for improved methods of crime prevention and law enforcement, efforts at revising the penal code and judicial process, and pressure for more adequate methods in the rehabilitation of convicted criminals. There has been a concurrent concern for persons who, because of ethnic or economic status, are seriously hampered in defending themselves in criminal proceedings. It has been increasingly recognized that the socially disadvantaged are forced to bear a double burden: intolerable conditions of life which render them especially vulnerable to forces that incite to crime, and the denial of equal justice through adequate defense.

In seeking to make a responsible judgment on the question of capital punishment, the following considerations must be taken into account:

1. *The Right of the State to Take Life*

The biblical and confessional witness asserts that the state is responsible under God for the protection of its citizens and the maintenance of justice and public order. For the exercise of its mandate, the state has been entrusted by God with the power to take human life when the failure to do so constitutes a clear danger to the civil community. The possession of this power is not, however, to be interpreted as a command from God that death shall necessarily be employed in punishment for crime. On the other hand, a decision on the part of civil government to abolish the death penalty is not to be construed as a repudiation of the inherent power of the state to take life in the exercise of its divine mandate.

2. *Human Rights and Equality Before the Law*

The state is commanded by God to wield its power for the sake of freedom, order and justice. The employment of the death penalty at present is a clear misuse of this mandate because (a) it falls disproportionately upon those least able to defend themselves, (b) it makes irrevocable any miscarriage of justice, and (c) it ends the possibility of restoring the convicted person to effective and productive citizenship.

3. *The Invalidity of the Deterrence Theory*

Insights from both criminal psychology and the social causes of crime indicate the impossibility of demonstrating a deterrent value in capital punishment. Contemporary studies show no pronounced difference in the rate of murders and other crimes of violence between states in the United States which impose capital punishment and those bordering on them which do not.

In the light of the above considerations, the Lutheran Church in America:

urges the abolition of capital punishment;

urges the members of its congregations in those places where capital punishment is still a legal penalty to encourage their legislatures to abolish it;

urges citizens everywhere to work with persistence for the improvement of the total system of criminal justice, concerning themselves with adequate appropriations, the improved administration of courts and sentencing practices, adequate probation and parole resources, better penal and correctional institutions, and intensified study of delinquency and crime;

urges the continued development of a massive assault on those social conditions which breed hostility toward society and disrespect for the law.

CHRISTIAN CHURCHES (DISCIPLES OF CHRIST) INTERNATIONAL CONVENTION

Cleveland, Ohio, October 11-16, 1957
Statement on Capital Punishment

We believe that Christians can no longer justify support of the practice of capital punishment. It has become increasingly clear that the certainty of apprehension and conviction rather than severity of punishment is the real deterrent to crime. Under such circumstances the death sentence becomes not a real protection to society but only a crude form of vengeance or retributive justice. Christian justification of punishment is always found in the hope of the rehabilitation of the offender; since dead people cannot be rehabilitated we can in no way defend capital punishment on Christian grounds.

In a very real sense also the practice of capital punishment stands in the way of more creative, redemptive, and responsible treatment of crime and criminals: There is the danger that society by concentrating attention on the

execution of a few criminals may mislead its members into thinking that it is dealing effectively with crime prevention. Christians must insist upon the importance of crime prevention and the rehabilitation of offenders rather than upon retribution.

It should be noted that the protection of society can as well be achieved by the imprisonment of certain classes of criminals as by the death sentence. Especially in view of the fact that innocent men have sometimes been mistakenly executed, we must now reject capital punishment as a clumsy, vindictive, and misleading practice that has no place in a Christian or even partially Christian culture. Four states and 27 foreign countries have already outlawed capital punishment. We urge Christians as citizens to work toward the elimination of the death penalty in their own states.

CHURCH OF THE BRETHREN STATEMENT ON CAPITAL PUNISHMENT

Adopted by 1957 Annual Conference

Because we regard human life as sacred, and because we believe that the sixth commandment has application to organized societies as well as to individuals, we stand ready to give our support to legislation, now proposed in many states, for the abolition of capital punishment.

STATEMENT ON CAPITAL PUNISHMENT

Adopted by 1959 Annual Conference, June 20, 1959

Because the Church of the Brethren holds that the sanctity of human life and personality is a basic Christian principle which the state is also committed to uphold; and because we believe that capital punishment does not really serve the ends of justice, often resulting in tragic and irrevocable miscarriages of justice;

We commend current efforts to abolish capital punishment, and call upon Brethren everywhere to use their influence and their witness against it.

GENERAL CONFERENCE MENNONITE CHURCH
CENTRAL DISTRICT CONFERENCE, GENERAL
CONFERENCE MENNONITE CHURCH

April 23-26, 1959 annual session at Goshen, Indiana

STATEMENT ON CAPITAL PUNISHMENT

Be it resolved that the secretary of the conference be instructed to write to the governors of the various states within our conference area where capital punishment is practiced to register our concern that this taking of life be discontinued, and that a redemptive approach be exercised in the treatment of all criminals.

THE METHODIST CHURCH.
Doctrine and Discipline of the
Methodist Church, 1964.

"The Methodist Social
Creed, Par. 1820. p. 661."

"We stand for the application of the redemptive principle in treating law offenders and for study and action directed toward the improvement of laws, correctional facilities and services, and court procedures in order to facilitate rehabilitation. For this reason we deplore capital punishment. We do not believe an individual should be excused for his personal responsibility to society; but we recognize that crime, and in particular juvenile delinquency leading to crime, is often a result of family failure and bad social conditions. Christian citizens and churches have a special opportunity and responsibility for creating those conditions of family life and social surroundings, wholesome recreation, vocational training, personal counselling, and social adjustment by which crime may be reduced, and offenders rehabilitated and redeemed by God's grace."

THE PROTESTANT EPISCOPAL CHURCH IN THE UNITED STATES OF AMERICA

5th General Convention, Florida, Oct. 16, 1958.
Capital Punishment

Inasmuch, as the individual life is of infinite worth in the sight of Almighty God; and

Whereas, The taking of this human life falls within the province of Almighty God and not within the right of man therefore be it,

Resolved, That the General Convention goes on record as opposed to capital punishment.

UNION OF AMERICAN HEBREW CONGREGATIONS

Resolution on Capital Punishment

Unanimously adopted by the 45th Biennial General Assembly, Miami Beach, Fla., Nov. 14-19, 1959:

We believe it to be the task of the Jew to bring our great spiritual and ethical heritage to bear upon the moral problems of contemporary society. One such problem, which challenges all who seek to apply God's will in the affairs of men, is the practice of capital punishment. We believe that in the light of modern scientific knowledge and concepts of humanity, the resort to or continuation of capital punishment either by a state or by the national government is no longer morally justifiable.

We believe there is no crime for which the taking of human life by society is justified, and that it is the obligation of society to evolve other methods in dealing with crime. We pledge ourselves to join with like-minded Americans in trying to prevent crime by removal of its causes, and to foster modern methods of rehabilitation of the wrong doer in the spirit of the Jewish tradition of tshuva (repentance).

We believe, further, that the practice of capital punishment serves no practical purpose. Experience in several

states and nations has demonstrated that capital punishment is not effective as a deterrent to crime. Moreover, we believe that practice debases our entire penal system and brutalizes the human spirit.

We appeal to our congregants and to our co-religionists, and to all who cherish God's mercy and love to join in efforts to eliminate this practice which lies as a stain upon civilization and our religious conscience.

CENTRAL CONFERENCE OF AMERICAN RABBIS

The annual convention of the Central Conference of American Rabbis, meeting in Chicago, Illinois, June 24-29, 1958, approved the following statement:

The question of capital punishment is now under official study in several states. The Central Conference of American Rabbis urges the abolition of the death penalty where it is still in effect. We are convinced that it does not act as an effective deterrent to crime.

UNITED SYNAGOGUE OF AMERICA

The Executive Council of the United Synagogue of America on March 7, 1960 adopted the following resolution:

Judaism has always regarded capital punishment repugnant to its tradition and to the most noble instincts of man. Even where the Bible prescribes such a punishment Jewish rabbinic and ethical tradition have so interpreted this sanction as to make its application virtually impossible.

Man has been created in God's image, and as such is endowed with sanctity. His life is God-given and his life ends by the grace of God. No man individually or group of men collectively may take the life of another even in what may seem to be just retribution to society for a heinous crime.

The United Synagogue of America believes that the time has come for the abolition of capital punishment from the

statute books of all states and provinces and we urge this course upon the various legislatures and the governors of states and provinces where capital punishment is still in force.

UNITARIAN UNIVERSALIST ASSOCIATION
MAY 13, 1961

Boston, Massachusetts
Capital Punishment

Whereas: Respect for the value of every human life must be incorporated into our laws if it is to be observed by our people; and

Whereas: Modern justice should concern itself with rehabilitation, not retribution; and

Whereas: It has not been proved that fear of capital punishment is a deterrent to crime; and

Whereas: Human judgments are not infallible, and no penalty should be used which cannot be revoked in case of error; and

Whereas: Capital punishment has not always been used impartially among all economic and racial groups in America;

Therefore Be It Resolved: That the Unitarian Universalist Association urges its churches and fellowships in the United States and Canada to exert all reasonable efforts toward the elimination of capital punishment; and

Be It Further Resolved: That copies of this resolution be sent to the Governors of all states in which capital punishment has not yet been eliminated, and to the Canadian Minister of Justice.

UNITED CHURCH OF CHRIST

Policy Statement Adopted by the General Synod at Boston, June, 1969, on the Abolition of Capital Punishment.

Whereas, the Committee for Racial Justice, the Council for Christian Social Action, and the UCC Ministers for

Racial and Social Justice are unalterably opposed to capital punishment and cannot remain silent regarding its continuance in our society, and

Whereas the human agencies of legal justice are fallible, and

Whereas we are concerned about the disproportionate number of black and poor who occupy death row and, white or black, are victims of an evil which decent people of our society have too long endured and which violates categorically our Judeo-Christian ethic, and

Whereas this outdated and barbaric practice has been found to discriminate on the basis of skin color and economic condition, and

Whereas the last-minute stay of execution of a 17-year-old Marie Hill in the gas chamber of North Carolina reminds us that one of the gross injustices in our judicial system is the retention of this barbaric practice,

Therefore Be It Resolved that the United Church of Christ commit itself to join in a nationwide campaign for the abolition of capital punishment and call upon other secular and religious institutions to join in a maximum effort for the abolition of capital punishment in the following:

a) Enlisting the support of Conferences and of other denominations and agencies and cooperating with existing efforts to abolish capital punishment.

b) Developing legislative and other political action for the abolition of capital punishment.

c) Resisting efforts to reinstitute capital punishment in those states where it has been abolished.

d) Testing the constitutionality of laws permitting capital punishment.

e) Making available and assisting in the raising of funds to pursue the above.

THE UNITED PRESBYTERIAN CHURCH IN THE UNITED STATES OF AMERICA
177th General Assembly, 1965

CAPITAL PUNISHMENT

1. Whereas, we believe in the sovereignty of God's grace and in his power to redeem and restore the lost to meaningful and useful life.

2. Whereas, we further believe in the ultimate significance of each individual person as one for whom Christ died.

3. Whereas, several states in this land have recently entered into reconsideration of capital punishment as part of their penal systems.

4. Whereas, we note both the grave and irrevocable nature of execution as punishment and that statistical evidence consistently asserts the failure of the death penalty as a deterrent of crime.

5. Therefore, the 177th General Assembly (1965) reaffirms the action of the 171st General Assembly (1959), and:

a. Declares its opposition to capital punishment.

b. Calls upon the judicatories and members of The United Presbyterian Church in the United States of America to work for the abolition of the death penalty in their respective states.

6. We further call upon the legislatures of those states in which capital punishment is still practiced to hasten to eliminate this punishment from their penal code.

NATIONAL CATHOLIC CONFERENCE FOR INTERRACIAL JUSTICE

The National Catholic Conference for Interracial Justice seeks declaration that capital punishment is unconstitutional.

The majority of those who have died and who now await death by capital punishment are members of minority groups. Thus, it seems a reasonable judgment that legal tools and equal treatment of due process are denied to some Americans. This in itself is unreasonable and harsh.

The National Catholic Conference for Interracial Justice seeks reorganization of the legal and penal systems which could bring about reconciliation of offenders with society. Reconciliation of man with himself and his fellow man is an ideal for which we are obliged to search.

Capital punishment is acknowledgment of our failure to believe in the principle of life and hope inherent in the heart of each human being.

Capital punishment is a cruel and unreasonable alternative to an already inhuman penal system in which the poor, who are oftentimes also minorities, suffer intolerably.

THE NATIONAL COALITION OF AMERICAN NUNS

Capital punishment denies inherent human rights such as the ideal of man's equality, the ideal of general and equal law, the right of due process and the manifold malfunction of court systems which should insure these rights.

Our development in the Judeo-Christian ethic calls for recognition of capital punishment as cruel and unreasonable. Attitudes, so deeply rooted in the mystery of man's psyche play a prominent role in determining guilt, or innocence; life and death. Contending within this psyche and prompting these decisions are such accidents as race, creed, sex, economics, etc. These variants make decisions on capital punishment unequal and unjust for those individuals who find themselves in subcultures of society.